PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADVANCEMENTS.

Where a will bequeathed all the residuary estate of the testatrix in equal shares to her children, but provided that amounts of money formerly loaned to two of them should be deducted, as advancements, from their distributive portions, the Supreme Court of California held inadmissible an instrument executed prior to the making of the will, releasing them from all liability to the testatrix for the loans in question: *In re Tompkins*, 64 Pac. 268. The ground of the decision is that notwithstanding the releases, the will shows a subsequent intention as to the method of finally distributing her property, and her right to prescribe this method is not in this case affected by her prior acts.

Release of Indebtedness

ADVERSE POSSESSION.

The rule that successive occupants holding from one another are allowed to tack their interests in making out the full period of adverse possession, seems to be the rule generally prevailing. The Supreme Judicial Court of Massachusetts applies it in the case of *Wishart* v. *McKnight*, 59 N. E. 1028, where the successive owners of a certain lot occupied an adjoining strip, and at each conveyance of the lot the grantor transferred the *possession* of the strip, though the strip was *not* described in any of the deeds. Possession and the right arising out of it, the court holds, may be transferred *in pais*.

Successive Occupants

ATTORNEY AND CLIENT.

There have undoubtedly been great relaxations in regard to the old common-law rules as to champerty, maintenance, etc. Sometimes the old rules are disregarded as no longer applicable, resting upon a fear of an encouragement of litigation no longer regarded as serious. But sometimes distinctions are drawn to get away from the strict rule and that is the case in *Hadlock* v. *Brooks*, 59 N. E. 1009, where the Supreme Judicial Court of Massachusetts holds that the employment of an attorney under an agreement that he

Champerty

ATTORNEY AND CLIENT (Continued).

shall receive a part of the recovery does not constitute champerty, unless it also contains the further element that the attorney's services shall not constitute a debt due from the client either before or after the recovery, but that the attorney must look solely to the recovery for his compensation.

BANKRUPTCY.

It appeared in *Fite* v. *Fite*, 61 S. W. 26, that upon a divorce between husband and wife the husband was decreed to pay to his wife a certain sum monthly as alimony. Later he was adjudged a bankrupt by the United States District Court. It is held in the above case by the Court of Appeals of Kentucky that his discharge in bankruptcy was a bar to the enforcement of the judgment. The court comes to the decision, apparently, with reluctance, but proceeds on the principle that the discharge in the bankruptcy court is binding on the state court, so long as the judgment of that court stands; and by it he had been relieved from this liability to pay alimony on the ground that he was just an ordinary debtor to his divorced wife, and the obligation was similar to one arising out of contract.

Alimony

BILLS AND NOTES.

Where an accommodation note is given as collateral security, the makers thereof are liable as principals and not as sureties, and the extension of time on the principal indebtedness without their consent will not release them from liability: *Dalaware County Trust, Safe-Deposit & Title Ins. Co.* v. *Haser*, 48 Atl. 694 (Pa.). In like manner, the court holds that payment of an accommodation note taken as collateral security may be enforced without resorting to the original debt for payment.

Accommodation Makers

BREACH OF PROMISE TO MARRY.

Whether evidence of seduction can be received in an action for breach of promise of marriage, to enhance the damages, when such seduction has not been specially pleaded was the question sought to be raised in *Myhill* v. *Bogardus*, 59 N. E. 900. The Court of Appeals of New York, intimating that the question is one of considerable difficulty, decides the case on another ground; but Chief Justice Parker, with whom concurred another member of the court, regarded the question as properly presented and held that the evidence would be inadmissible unless specially pleaded. These judges accordingly dissented from the decision of the majority.

Evidence of Seduction

CONSTITUTIONAL LAW.

People vs. *Coler*, 59 N. E. 776, is an important decision. In this case the section in question provided that there should not be used on any municipal work within the state any stone which it should be necessary to dress or carve for such use, unless the same should be prepared for such use within the boundaries of the State of New York. This requirement is held void; first, as depriving municipalities and those contracting therewith of the right to contract freely; and, second, as in contravention of the Federal Constitution, vesting in Congress the right to regulate interstate commerce.

Public Contracts Material

The determination of the narrow line which divides the cases where prohibition of the sale of articles of commerce is constitutional, and where it is not, is constantly raising questions of difficulty. In *State* v. *Layton*, 61 S. W. 171, the Supreme Court of Missouri is met by the question of the constitutionality of an act prohibiting the sale of alum baking powders. The act is upheld, though with some seeming hesitation. The court regards it as a *bona fide* attempt to guard the public health, and thinks that the articles are not so universally conceded to be wholesome and innocuous that judicial notice may be taken thereof.

Sale of Prohibited Articles

A state has no power to regulate the charges of a railroad company for the carriage of goods between two points in the state, where the course of transportation must be for a considerable part of the distance through another state or territory: *Kansas City Ry. Co.* v. *Board of Railroad Commissioners of Arkansas*, 106 Fed. 353. Such transportation the United States Circuit Court (W. D. Arkansas) holds, although continuous and made on through bills of lading, constitutes commerce "among" the states, within the meaning of the commerce clause of the Federal Constitution, and is subject to regulation by Congress alone.

Interstate Commerce, Regulation of Rates

In *Phelps-Bigelow Windmill Co.* v. *North American Trust Co.*, 64 Pac. 63, a judgment had been perfected by a creditor. At the time the law of Kansas upon an order of sale provided for an appraisement of the property, and that land should not be sold for less than two-thirds of its appraised value. This law was subsequently repealed and then an order of sale having been issued, the property was sold without appraisement, and for a price much less than two-thirds of an appraisement formerly made upon

Right in Existing Remedies

CONSTITUTIONAL LAW (Continued).

an unsuccessful attempt to sell under the old law. Under these circumstances the Supreme Court of Kansas holds, against the dissent of two judges, that the debtor, on whose land the lien had rested, had no vested right in the remedies or collection laws in force when the contract, upon which the judgment arose, was made, which would prevent legislative interference with them: that therefore the repeal of the appraisement law and the sale of the property without appraisement was valid.

CONTRACTS.

Accrual of Cause of Action

Just how far a declaration by one party of an intention not to perform his part of the contract gives to the other party an immediate right of action, seems to be one of those branches of the law not yet thoroughly worked out. In *Pittman* v. *Pittman*, 61 S. W. 461, we have one phase of this question presented. In that case the plaintiff had performed services for the defendant in consideration of the defendant's promise to adopt him and make him the defendant's heir. The defendant later declared that he did not intend to carry out the contract, and it appeared that he had acted fraudulently in making the promise. The Court of Appeals of Kentucky holds that no recovery for the value of the services rendered can be had during the life of the defendant, for he may yet conclude to keep his contract.

Option on Stock, Tender

Where it appeared that defendant had given plaintiff an option on certain stock, agreeing to transfer it at any time before the option expired on payment of the price, the Supreme Court of Rhode Island holds (*Guilford* v. *Mason*, 48 Atl. 386) that the strict rule of tender does not apply to such a contract. The plaintiff had no right to the actual transfer before he should pay his money, and the defendant no right to the money before he should deliver the stock. "The two things were interdependent, and, in the eye of the law, were to be performed simultaneously." Hence a new trial was granted, since plaintiff had been nonsuited on the ground that he was not prepared at any time to make a strictly legal tender.

CORPORATIONS.

Subscription to Capital Stock

The Supreme Court of Oklahoma holds, in *Chicago Building & Mfg. Co.* v. *Lyon*, 64 Pac. 6, that one cannot withdraw his subscription to the capital stock of a corporation without the consent of all persons who subscribed to such stock, prior to such withdrawal. The principle from which the court draws its conclusion is that it

CORPORATIONS (Continued).

regards the subscription by a number of persons to the stock of a corporation to be thereafter formed by them, as constituting a contract between the subscribers to become stockholders when the corporation is formed; hence that it is irrevocable from the date of the subscription except upon the conditions above.

Liability of Township for Money Borrowed

A trustee having authority to erect a school-house, but no power to borrow money, did borrow some to pay the contractor by representing to the lender that the township had not the necessary funds. The money was paid to the contractor and the lender sued the township. The Appellate Court of Indiana holds, in *White River School Township* v. *Dowell*, 59 N. E. 867, that the plaintiff might recover the money so loaned from the township, though the trustee had no power to borrow. The court claims it is a case for subrogation; that one party not a mere volunteer pays for another the debt for which the latter was primarily liable.

Action for Unpaid Subscription

A case presenting somewhat similar facts to the case of *Bates* v. *Day*, *supra*, but in which the court comes to a very different conclusion, is the case of *Harrell* v. *Blount*, 38 S. E. 56. There the Supreme Court of Georgia holds that a creditor of an insolvent corporation, suing exclusively for his own benefit, may proceed against stockholders for balance due upon their stock subscriptions without joining with them other stockholders, similarly liable. The principle upon which the court proceeds is that "the proceeding amounted to merely an equitable garnishment designed and subject to the plaintiff's demands against the corporation assets belonging to it, which were beyond the reach of legal process."

COVENANTS.

Against Incumbrances

The difficulty of the common law in allowing a broken covenant to run with land, is disregarded in *Geiszler* v. *De Graaf*, 59 N. E. 993, where the Court of Appeals of New York holds that a covenant in a deed against incumbrances is not a personal covenant, but runs with the land, and passes to a remote grantee, though there may have been a nominal breach of the covenant when the deed was delivered. The necessity to work out practical justice does not stop to satisfy the technicalities of the common-law rule.

CRIMINAL LAW.

In *Powers* v. *Commonwealth*, 61 S. W. 735, one of the cases arising out of the murder of Goebel, the Court of Appeals of Kentucky by a majority decision holds that the pardons issued by Taylor after Goebel had been declared governor by the legislature were invalid. The court holds that when two persons are present at the seat of government, each claiming to be a governor *de jure*, and each assuming to perform the duties of the office, the one who is governor *de jure* is also governor *de facto*, especially as affecting the validity of a pardon; that being an act of the commonwealth's grace asserted against the commonwealth.

Pardoning Power

DESCENT.

The Supreme Court of Kansas holds, in *Smith* v. *Becker*, 164 Pac. 70, that the statute of their state (a statute similar to those of other states), providing that when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property and effects shall be administered and disposed of in all respects as if he were naturally dead, must be confined in its application to such disposition of the estate as is necessary to satisfy the rights of creditors; the descent of the property is not cast upon the heirs by the fact of such sentence and imprisonment. The court regards important the considerations of possible commutation of the sentence or pardon. Three judges dissent, regarding the decision as defeating the very purpose of the statute.

Imprisonment for Life

ELECTION OF REMEDIES.

"The rule that a choice of one of two inconsistent remedies or causes of action waives the other, applies only where there are two such remedies or causes of action." The Supreme Court of Wisconsin, applying this rule, holds, in *Fuller-Warren Co.* v. *Harter*, 85 N. W. 698, that if a person pursues a cause of action which he erroneously supposes he has and is defeated because of the error, he is not thereby precluded from suing over upon the proper cause of action.

Stake as to Existence of Additional Remedy

EMINENT DOMAIN.

In *Kansas & T. Coal Ry. Co.* v. *Northwestern Coal & Mining Co.*, 61 S. W. 684, the Supreme Court of Missouri holds that where a railroad company is regularly organized as such under laws making it a common carrier, the fact that its officers, directors, and stockholders are

Road, Private or Public?

EMINENT DOMAIN (Continued).

the same as those of a coal-mining company, from which the railroad company will probably draw the major portion of its business, and that the mining company has loaned the railroad company the most of the capital required to build the road, does *not* render it a private road, so as to deprive it of the power of eminent domain. The property taken was from another coal company, and three judges dissent from the decision of the court on the ground that this is merely a rivalry between two coal companies, in which one has assumed the "garb of a railroad corporation," for the purpose of shutting out its rival from the market and reducing it to a dependency; that the land is therefore taken for a private purpose.

EVIDENCE.

Competency of Witness

The general prevalence of statutes at the present day rendering incompetent one party to a contract, as to statements or transactions in the presence of the deceased party, gives more than local interest to the case of *Dickerson* v. *Payne*, 48 Atl. 528. These statutes have most frequently been applied where each party takes some part in the transaction, or where evidence is offered as to statements made, but in this case the Supreme Court of New Jersey holds that in an action brought against an administrator to recover for services rendered to the intestate by the plaintiff as housekeeper and nurse, the plaintiff is not competent to testify to services rendered in the presence of the intestate. The decision, however it may be within the letter of the act, seems hardly within its spirit.

Use of a Diagram

In *Hogan* v. *Carr*, 48 Atl. 688, the Supreme Court of Pennsylvania holds that a rough freehand drawing might be used by a handwriting expert to explain his methods to the jury, though it itself was not admissible in evidence. But they further held that while it was allowable for the expert so to use it, it was error for the trial court to refuse to permit the counsel for the opposing side to use it in making his address to the jury, since they regarded the ruling as preventing the counsel from adequately and intelligently discussing the methods of the expert.

EXTRADITION.

Discretion of Governor

The Supreme Court, Special Term (New York County), holds, in *People ex rel. Gallagher* v. *Hogan*, 69 N. Y. Supp. 475, that it is no defence to a warrant of extradition that the prisoner has been convicted of a crime in the state, but has been bailed during his appeal, and that he

EXTRADITION (Continued).

cannot be extradited till he has served his sentence, or until he has been finally acquitted. The basis of the decision is that the governor of the state may waive the right of the state to punish the prisoner for a crime committed in the state.

FELONY.

It has frequently been questioned whether the rule of the common law that one guilty of a felony must have been con-

Action for Civil Damages

victed or acquitted, or that there have been some other termination of the criminal proceeding, for which the person upon whom the felony was committed was not responsible, is still in force in our various jurisdictions. The question arose in *McBlain* v. *Edgar*, 48 Atl. 600, where there was an action for damages for an offence (which at criminal law would be rape) against a defendant who pleaded that he remained at the time of the action wholly untried. The Court of Errors and Appeals of New Jersey overrules the plea, holding that the reason upon which the common-law rule was founded has disappeared under our modern system of criminal procedure, with its public prosecutor. The court says: "The duty of a private person in this state ceases when he has made his complaint and appeared before the grand jury and secured or failed to secure an indictment. After that the prosecution is in the hands of the public prosecutor, and for his acts the private citizen is not responsible, nor chargeable with either his zeal or neglect in prosecuting."

FORMER RECOVERY.

The Supreme Court of Pennsylvania holds, in *Kehoe* v. *Philadelphia*, 48 Atl. 679, that an action by a property owner

Change in Grade of Street

against the city for damages caused by water accumulating in holes in the street and percolating into the plaintiff's cellar after the grade of the street had been changed, was not barred by the recovery which the plaintiff had had for the damages occasioned by the change of grade. The court proceeds on the theory that the new cause of action is for the negligent maintenance of the street as altered by the change in grade.

GIFTS MORTIS CAUSA.

The Civil Code of California, following in this respect the common law, allows gifts made in view of death to be revoked

Suit to Revoke, Death of Donor

by the giver at any time before death. In *Adams* v. *Atherton*, 64 Pac. 283, it appeared that a person had made a gift *mortis causa* to the defendant, but before her death had brought an action to revoke the gift, but

GIFTS MORTIS CAUSA (Continued).

she died before the trial. The Supreme Court of California holds that the commencement and prosecution of the action was sufficient to revoke the gift, though it did not proceed to judgment on account of the death of the donor. Judgment is therefore allowed to the executrix of the deceased donor.

HOMICIDE.

Evidence as to the flight of the accused, where the homicide is admitted, may be considered by the jury to determine the degree of the crime charged. *State* v. *Lyons*, 64 Pac. 236 (Supreme Court of Idaho).

Degree of Crime, Flight

INFANTS.

The line between an infant's liability on the ground of fraud and his ordinary non-liability in contract is sometimes difficult of application. A close case appears in *Damron* v. *Commonwealth*, 61 S. W. 459. There an infant had conveyed land to father to enable the father to become surety in a bail bond, and that fact was recited in the deed as the consideration therefor. The court accepted the grantee as surety upon the faith of the grantor's (the infant's) testimony in open court that he was twenty-one years of age. Under these circumstances the Court of Appeals of Kentucky holds that the infant grantor was estopped, upon arriving at age, to disaffirm the deed. We are aware, say the court, that in some jurisdictions the contrary view is taken, but we believe that in most jurisdictions the rule is as announced.

Disaffirmance of Deed, Estoppel

INSURANCE.

A condition of a fire policy, requiring the insured to furnish proofs of loss within a certain time, is broken when the insurer does not receive them until after such time, though the insured mailed them before the time had expired: *Peabody* v. *Satterlee*, 59 N. E. 818. The Court of Appeals of New York, in reaching this conclusion, proceeds upon the ground that where notice is required to be given personal notice is intended, and the insured, by selecting the mail, made it his agent and is liable for its effectiveness. Three judges dissent without assigning any reason.

Proofs of Loss, Mailing

The United States Circuit Court of Appeals (Third Circuit) holds, in *Life Insurance Co.* v. *O'Neill*, 106 Fed. 800, that the mere relation of father and son is not enough to give an adult son an insurable interest in his father's life. The court defines an insurable interest as follows:

Insurable Interest

INSURANCE (Continued).

"No person has an insurable interest in the life of another unless he would in reasonable probability suffer a pecuniary loss, or fail to make a pecuniary gain by the other's death; or (in some jurisdictions) unless, in the discharge of some undertaking, he has spent money, or is about to spend money, for the other's support or advantage."

JOINDER OF ACTIONS.

The Supreme Court of Pennsylvania holds, in *Dutton* v. *Borough of Lansdowne*, 48 Atl. 494, that one injured by a defective sidewalk cannot sue the municipality and the property owner in the same action on the ground that they are not joint tort feasors, though both may be liable: the owner's liability is primary; and that of the municipality secondary. In case of such misjoinder of actions, the court holds, no recovery may be had against either.

Defective Sidewalk

LANDLORD AND TENANT.

The law seems well settled that ordinarily, if a tenant holds over, the landlord may treat him as a trespasser or as tenant for another year, and collect rent accordingly. But how if the holding over be involuntary? This question arose in *Sullivan* v. *George Ringler & Co.*, 69 N. Y. Supp. 38, under the following circumstances: A. leased to B.; B. sublet to C.; C. against the will of B. held over after the expiration of his own and B.'s term: held that B. was liable for another year's rent at the election of A. The Supreme Court, Appellate Division (Second Department), holds that a tenant will be excused for holding over, only if his removal at the expiration of his lease is rendered impossible by inevitable accident or the act of God, without fault of the party sought to be charged.

Involuntary Holding Over

Where a landlord and tenant having a lease for one year, but three months of which had run, agreed that the tenant might occupy the building at a fixed sum per month so long as he remained therein, the Supreme Court of Michigan held such agreement valid and binding on the parties, though the rent agreed on was less than the rent fixed on in the lease: *Andre* v. *Graelner*, 85 N. E. 464. The court proceeds on the theory that the contract is in part executory, and that the tenant might refuse to perform his part and submit to damages, but that he is willing, instead, to enter into this new contract, and that this presents sufficient consideration.

Change of Contract, Consideration

LIMITATIONS OF ACTIONS.

Creditors' Suits

It is frequently difficult to draw the line between those defences or rights which are personal to a debtor, and those which his creditors may avail themselves of. Such a question is presented in *Callaway's Admr.* v. *Saunders*, 38 S. E. 182, where the Supreme Court of Appeals of Virginia decides that a creditor may set up the statute of limitations against another creditor of the debtor's estate, though the debtor himself has not relied on that defence.

On the other hand a very similar question came up in *Bresee* v. *Bradfield*, 38 S. E. 196, where there had been a conveyance by a *cestui que trust* to her father the trustee of the *cestui's* interest in the trust estate. It purported to be in satisfaction of her indebtedness to him, and the same court holds that whatever right the *cestui* may have to avoid the conveyance as made between those standing in a trust relation, creditors have no such right on that ground, but if they wish to have it set aside, they must do so on other grounds, *e. g.*, that as to them it is fraudulent. In short, they gain nothing from the fact that the conveyance was between those standing in a fiduciary relation.

Assessments upon Stockholders

The United States Circuit Court of Appeals (Eighth Circuit) holds, in *Deweese* v. *Smith*, 106 Fed. 438, that the statute of limitations does not commence to run against the enforcement of the entire liability or against the enforcement of any particular portion of the liability of the shareholder of a national bank to pay its debts, until the time when the comptroller has declared the entire liability or the particular portion of it in issue to be due.

PHYSICIANS.

Unlawful Practice, Burden of Proof

The statutes requiring of physicians compliance with certain legislative requirements before undertaking the practice of medicine are quite general. In *State* v. *Wilson*, 64 Pac. 23, the Supreme Court of Kansas holds that in a criminal prosecution for violation of such laws, it devolves on the defendant to produce evidence tending to show that he has satisfied the requirements of the statutes, *e. g.*, in that state that he has attended certain courses of instruction, and graduated in some medical college, etc. The court bases its decision on the fact that such evidence is not accessible to the state, and is peculiarly within the defendant's knowledge and control. One judge dissents, thinking this decision as to the *onus probandi* marks a radical departure in criminal procedure.

PUBLIC CHARITY.

In *Troutman* v. *De Boissière Odd Fellows' Orphans' Home*, 64 Pac. 33, the Supreme Court of Kansas holds that an absolute conveyance of property to trustees "in trust to provide a home upon said premises for the orphan children of deceased Odd Fellows of the State of Kansas," creates a legal public trust or charity. Two judges dissent, and the opinion of the court as well as the dissenting opinion, carefully reviews the question of what constitutes a public charity. The court cites the case of *Philadelphia* v. *Masonic Home*, 160 Pa. 572, but regards it of doubtful application, inasmuch as there the question was with regard to exemption from taxation, while here the trust is attacked on the ground that it violates the Rule against Perpetuities. The dissenting judges hold that, in order to constitute a public charity, so as to avoid the effect of this rule, "the beneficiaries must constitute a public or *quasi* public class, standing as a class in relation to society, and to whom as a class society is under the obligations of charity.

What Constitutes

RAILROADS.

A receiver of a railway company which furnishes cars to another company, under a traffic arrangement whereby the latter company is to operate them, is not liable for damages resulting from such operation over the tracks of the latter company: *Thomson* v. *Dotterer*, 29 Southern, 483 (Supreme Court of Louisiana).

Receiver's Liability

WILLS.

The rule that where a portion of a residue is bequeathed to one who dies before the testator, or to one incapable of taking, the testator as to such portion dies intestate, is apparently well established. An exception to this, or rather a case in which this rule is not applied, appears in *Martineau* v. *Simonson*, 69 N. Y. Supp. 185. In that case a testator bequeathed his residuary estate to his sons and daughter in equal shares, and two of the sons were incapable of taking, under the New York law, because they were subscribing witnesses to the execution of the testator's will. The Supreme Court, Appellate Division (Second Department), holds that the shares of such sons passed to the other residuary legatees. The ground on which the court proceeds is that the bequest was to a class, and the court will regard the class as composed of those capable of taking and those only.

Residuary Legatees, Incapable of Taking